



REC'D TN

REGULATORY AUTH

BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, Tennessee 37201-3300

615 214-6301
Fax 615 214-7406

Guy M. Hicks
General Counsel

'99 SEP 13 AM 9 24

September 13, 1999

OFFICE OF THE
EXECUTIVE SECRETARY

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996*
Docket No. 99-00430

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Supplemental Brief and Reply Brief to the Brief of Deltacom Regarding Extended Loops. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

FILE

BEFORE THE TENNESSEE REGULATORY AUTHORITY REC'D TN
Nashville, Tennessee REGULATORY AUTH.

'99 SEP 13 AM 9 24

In Re: *Petition for Arbitration of DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996* THE
EXECUTIVE SECRETARY
Docket No. 99-00430

BELLSOUTH'S SUPPLEMENTAL BRIEF AND REPLY BRIEF TO THE BRIEF OF
DELTACOM REGARDING EXTENDED LOOPS

I. INTRODUCTION

On August 19, 1999 BellSouth Telecommunications, Inc. ("BellSouth") filed its Brief Regarding the Appropriateness of Certain Issues in this Arbitration Proceeding. In response to BellSouth's Brief, on September 9, 1999, DeltaCom Communications, Inc. ("DeltaCom") filed its Pre-Arbitration Brief Regarding Extended Loops. BellSouth now supplements its original Brief and responds to the issues and matters raised in DeltaCom's September 9, 1999 Brief. Specifically, BellSouth supplements its August 19, 1999 Brief to state its position regarding DeltaCom's improper attempt to expand Issue No. 5 as stated in the Petition from one issue into four issues. BellSouth noted its objection to this improper expansion in the parties' Joint Issues Matrix where DeltaCom attempts to rewrite and expand Issue No. 5. In reply to DeltaCom's Brief, BellSouth provides its response to DeltaCom's improper attempt to define an "extended loop" as originally raised in Issue No. 2(b)(iii) of the Petition to also include a UNE loop, UNE cross connection, and special access transport service. As explained below, BellSouth opposes this effort.

II. DELTACOM'S REQUEST FOR "EXTENDED LOOPS"

BellSouth raised at least three objections in its August 19, 1999 Brief to DeltaCom's attempt to include the unique request for a UNE loop, UNE cross connection, and special access

transport service within the parameters of any issue raised in this arbitration proceeding. BellSouth objected that (1) DeltaCom did not expressly include the request as part of any issue set forth in its Petition for Arbitration as is required under Section 252(b)(2)(A) of the Act; (2) BellSouth is not required under the 1996 Act or the FCC's Rules to provide UNE combinations; and (3) the request is not for a combination of UNEs but to combine a UNE (i.e. loop) with a tariffed service (i.e. special access transport service). (See BellSouth's 8-19-99 Brief at pp. 10-11). BellSouth refers the Authority to its earlier Brief for further legal reasons why this attempt is inappropriate.

A. THE PETITION

DeltaCom contends in its Brief that "[t]he language included with the Petition covers the combination of a UNE loop, cross connection and special access transport service if either that combination is to be considered an 'extended loop' or it is a combination furnished to DeltaCom as of January 25, 1999." (emphasis added). Although DeltaCom goes to great lengths in its efforts to try to show that somehow the request was included within the Petition, it nonetheless fails to do so. The 1996 Act, at Section 252(b)(2)(A)(i)-(iii) expressly sets forth the duties of the Petitioner (e.g. DeltaCom) when filing for arbitration. Under the Act, DeltaCom is required to state "the unresolved issues" in the Petition. DeltaCom's arguments that the specific request at issue here, (combination of UNE loop, UNE cross connect and special access transport service) is somehow "included with the Petition" if you cobble together Exhibit "A" (which, in DeltaCom's words, is "a lengthy proposed Interconnection Agreement) and Exhibit "B" (which, as described in the Petition, is "a summary of the issues on which DeltaCom thinks the parties have not reached an agreement" (emphasis added), simply misses the mark. (See ¶ 7 of the Petition and paragraph 24 (Issue 2(b)(iii)) of the Petition.) (See DeltaCom's Brief at 2-3.) This entire argument is contrary to

Section 252(b)(2)(A)(i) which expressly requires DeltaCom to state the unresolved issues in its Petition, not in multiple, lengthy exhibits attached to the Petition. *See MCI Telecomms. Corp. V. Pacific Bell*, Case No. C97-0670, slip op. At 35 (N.D. Cal., Sept. 29, 1998) (“[S]imply listing an issue in an appendix to a petition does not sufficiently ‘set forth’ the issues for arbitration, and accordingly the issue is not properly before the Court.”). DeltaCom’s Petition expressly set forth seventy-three (73) issues to be arbitrated, including Issue 2(b)(iii) which DeltaCom claims gets its unique request in the door even though it is not expressly set out as part of its definition of an “extended loop” (which is generally accepted to mean a UNE loop, UNE cross connect, and UNE dedicated transport – not access transport service). Given the multitude of issues stated by DeltaCom in its Petition, BellSouth is entitled to more specific notice that DeltaCom was also seeking a unique or different version of an “extended loop” when it filed its Arbitration Petition.

B. DELTACOM’S CONTENTION REGARDING PREVIOUSLY PROVIDED
COMBINATIONS OF UNE LOOPS, CROSS CONNECTION AND SPECIAL ACCESS
TRANSPORT FROM BELL SOUTH

DeltaCom’s argument that since it has apparently been provided with “more than 2500” combinations of a UNE loop, cross connection and special access under its prior interconnection agreement, somehow now means that this unique request should be included among the issues for arbitration misses the mark once again. First, BellSouth acknowledges that it provisioned a number of these types of combinations to DeltaCom; however, BellSouth did so by mistake. Moreover, after discovering this mistake BellSouth took steps to correct it. The prior DeltaCom/BellSouth Interconnection Agreement does not require the provision of such combinations. Thus, in order to bring these service arrangements into compliance, pursuant to the parties’ mutual understanding, DeltaCom submitted over fifty (50) additional collocation applications in May, 1999. When such

collocation arrangements have been completed, BellSouth's provisioning of these service arrangements will be curtailed, and these unique combinations will be converted. Regardless of the reason, the fact that BellSouth previously provisioned certain arrangements to DeltaCom does not obligate BellSouth to do so under a new interconnection agreement; and, more importantly, nor does that fact make it an issue subject to arbitration if DeltaCom did not expressly raise the subject of a combination of a UNE with a tariffed service in its Petition.

Finally, DeltaCom has misstated BellSouth's commitment made to the FCC after the U.S. Supreme Court's decision in the *AT&T v. Iowa Utilities Board* case. In footnote 7 on page 4 of DeltaCom's Brief, DeltaCom states: "Indeed, BellSouth has committed to the FCC that it will continue to provide combinations to CLECs in the same way it has in the past." (emphasis added). DeltaCom even attached to its Brief as Exhibit 1 a copy of the February 11, 1999, letter BellSouth sent to the FCC regarding its commitment to continue to provide unbundled network elements to competing local exchange carriers ("CLECs"). The pertinent language from this letter reads as follows:

1. Until such time as the FCC adopts new definitions of unbundled network elements, BellSouth will continue to provide every unbundled network element in its contracts, which affords access to all those currently listed in Section 51.319 of the Authority's Rules.

There is not one single mention of the provision of combinations of unbundled network elements in BellSouth's 2-11-99 letter to the FCC. The letter, to the contrary, expressly states that BellSouth has committed to provide every unbundled network element during this time of uncertainty, clearly meaning individual UNEs, especially since there is no obligation for BellSouth to do the combining

for CLECs under the Act. DeltaCom has either not read the letter carefully or it has chosen to craft its own (mis)interpretation of it.

C. OTHER UNE COMBINATIONS

Unfortunately, DeltaCom again misstates BellSouth's position here. BellSouth does not dispute that the U.S. Supreme Court upheld the validity of the FCC's Rule 51.315(b) regarding pre-existing combinations of UNEs in the *AT&T v. Iowa Utilities Board* decision. BellSouth, however, does not believe that this rule can be effectively applied until the FCC completes its proceedings regarding Rule 51.319 and the list of UNEs that must be made available. Moreover, BellSouth demonstrated in its Brief that it is not required to combine UNEs for CLECs such as DeltaCom. The FCC's Rules 51.315(c) through 51.315(f) regarding incumbent LEC provisioning combinations of UNEs remains vacated today. (*See* BellSouth's 8-19-99 Brief for further argument).

III. IMPROPER EXPANSION OF ISSUE NO. 5

Through the parties' Joint Issues Matrix, DeltaCom improperly attempts to introduce new issues into this arbitration proceeding. Specifically, under Item No. 27, which is Issue No. 5 from the Petition, DeltaCom seeks to convert this single issue into four (4) issues. BellSouth noted its opposition to this effort on the Joint Issues Matrix and now provides further explanation as to why this is inappropriate. For example, included among these four new issues is the question of so-called "binding forecasts." The subject of binding forecasts was not a part of the parties' prior interconnection agreement and is a new issue to the parties' negotiations. If DeltaCom intended to have this issue and the other three (3) issues it now seeks to have arbitrated under Issue No. 5, then it should have expressly raised these issues in its Petition as is required under the Act. It is important to note here that what DeltaCom is attempting to do is not a simply rewording of an issue for

clarification purposes, but rather, it is attempting to add to and expand an issue as set forth in its Petition. This is clearly contrary to the 1996 Act's requirements for arbitrations.

Any attempt by DeltaCom to introduce new issues in this arbitration must be rejected as being contrary to the Act. Section 252(b)(2)(A)(i)-(iii) expressly sets forth the duties of the petitioner (e.g. DeltaCom) when filing for arbitration. Under the Act, DeltaCom is required to state "the unresolved issues" in the Petition. Issues and positions from a draft agreement contained in an exhibit attached to the Petition do not comply with the Act. *See MCI Telecomm. Corp. V. Pacific Bell*, Case No. C97-0670, slip op. At 35 (N.D. Cal., Sept. 29, 1998) ("[S]imply listing an issue in an appendix to a petition does not sufficiently 'set forth' the issues for arbitration, and accordingly the issue is not properly before the Court."). The reason is clearly to provide the responding party (e.g., BellSouth) with a reasonable opportunity to respond to the Petition. (See Section 252(b)(3)). DeltaCom understood this requirement in as much as it listed some seventy-three (73) issues in its Petition under Paragraph 11. Further, under Section 252(b)(4)(A), the Authority is required to "limit its consideration of any petition under Paragraph (1) to the issues set forth in the Petition and in the response, if any, filed under Paragraph (3). (emphasis added). Issue 5 as set forth by DeltaCom in its Petition states the issues as follows:

"Issue 5: Local Interconnection (Att. 3)

Statement of Issue:

Should the parties continue operating under existing local interconnection arrangements?"

It was this precise issue that BellSouth responded to in its Response to the Petition. There is no mention that Exhibits "A" or "B" expand on what DeltaCom was seeking through this issue; in fact there is no reference to Exhibit "B" in Issue No. 5 at all. Even if the Act permitted DeltaCom to

expand beyond its Petition on the issues subject to this arbitration, which it clearly does not, DeltaCom's request is untimely. The Authority should reject DeltaCom's attempt to expand the issues in this proceeding as being contrary to the requirements of the Act.

IV. CONCLUSION

For the foregoing reasons, and those previously set forth in BellSouth's August 19, 1999 Brief, BellSouth respectfully requests that the Authority adopt BellSouth's positions and legal arguments on the specific issues addressed herein.

Respectfully submitted,


BELLSOUTH TELECOMMUNICATIONS, INC.

GUY M. HICKS
General Counsel
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

THOMAS B. ALEXANDER
BENNETT L. ROSS
R. DOUGLAS LACKEY
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375-0001
(404) 335-0750

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☒ Hand
☐ Mail
☐ Facsimile
☐ Overnight

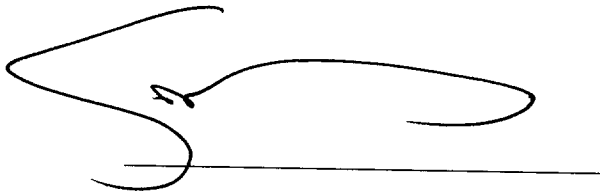
Richard Collier, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0500

- ☐ Hand
☐ Mail
☒ Facsimile
☐ Overnight

H. LaDon Baltimore, Esquire
Farrar & Bates
211 Seventh Ave. N, # 320
Nashville, TN 37219-1823

- ☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

David I. Adelman, Esquire
Sutherland, Asbill & Brennan LLP
999 Peachtree St., NE
Atlanta, GA 30309

A handwritten signature in black ink, appearing to be 'D. Adelman', written over a horizontal line.